Hasrat Usaha Sdn Bhd v Pati Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03–242 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZHAR MA'AH JJCA
17 DECEMBER 2010

Civil Procedure — Appeal — Appeal against judgment of High Court — Judgment entered on admission of fact — Whether defendant's letter to plaintiff unequivocal admission of debt — Rules of the High Court 1980 O 27 r 3

Hasrat Usaha Sdn Bhd ('the defendant'), the main contractor of a project in Putrajaya had appointed Pati Sdn Bhd ('the plaintiff') as its subcontractor to perform certain construction works. Although the defendant had made payments to the plaintiff for the works it had done under the subcontract, the plaintiff claimed that a sum of RM2,040,586.38 was allegedly still outstanding under the subcontract. The plaintiff filed the present action seeking to enter judgment for the sum of RM2,040,568.38. The defendant disputed the plaintiff's claim and in its defence alleged defective works by the plaintiff and a delay in the completion of the works. The total sum claimed by the defendant against the plaintiff by way of counterclaim was RM2,158,095.70. The plaintiff relied on an undated letter from the defendant wherein the latter had sought confirmation as to whether a sum of RM1,310,806.02 was due to the plaintiff as evidence of an admission of a fact, which entitled the plaintiff to enter judgment against the defendant under O 27 r 3 of the Rules of the High Court 1980 ('RHC'). The High Court judge allowed the plaintiff to enter judgment, on an admission of fact by the defendant, for the sum of RM1,310,806.02 with interest. This was the defendant's appeal against that decision. The defendant submitted that the said letter taken as a whole was in the nature of an enquiry requesting for confirmation of the state of account and could not be construed as an admission of debt. The defendant further submitted that the plaintiff's response to the said undated letter stating that the sum owed by the defendant to it was RM2,040,586.38 showed that there was a real dispute.

Held, dismissing the appeal with costs:

(1) (per **Mohd Hishamudin JCA, dissenting**) The defendant's undated letter to the plaintiff did not amount to an unequivocal admission of fact under O 27 r 3 of the RHC. The content of the letter was in the nature of an inquiry rather than in the nature of an admission. This inquiry, which was for 'audit' purposes, was sent to the plaintiff on the defendant's own volition and not in response to any demand for any sum made by the

plaintiff to the defendant. Further, the plaintiff did not confirm the sum inquired by the defendant but mentioned a different sum as the amount owing. In any case, even if the defendant's inquiry could be regarded as an unequivocal admission of fact, the court had a discretion as to whether judgment should be entered depending on the circumstances of the case. In the present case, the basis of the plaintiff's claim was not clear or consistent but was instead confusing. In fact the manner in which the plaintiff arrived at the sum claimed of RM2,040,586.38 ought to be an issue to be tried. As such it was not justified that judgment in the sum of RM1,310,806.02 ought to be entered in favour of the plaintiff at this juncture (see paras 23–28).

(2) (per **Azhar Ma'ah JCA**) From the facts of the instant case, the undated letter, which emanated from the defendant's own office, was proof of the fact that the defendant's own accounting records showed that there was an outstanding sum of RM1,310,806.02 due and payable to the plaintiff. Although the plaintiff disputed the correctness of the amount owed and claimed that a bigger amount was due and owing from the defendant, there was a clear and unequivocal admission by the defendant that there was a balance due to the plaintiff to the tune of RM1,310,806.02. The defendant was thus under an obligation to pay to the plaintiff the sum of RM1,310,806.02 and it did not make any difference that the defendant was merely enquiring and seeking confirmation of the correctness of the figure (see paras 38).

[Bahasa Malaysia summary

Hasrat Usaha Sdn Bhd ('defendan'), kontraktor utama bagi sebuah projek di Putrajaya telah melantik Pati Sdn Bhd ('plaintif') sebagai subkontraktornya untuk menjalankan beberapa kerja pembangunan. Meskipun defendan telah membuat pembayaran kepada plaintif untuk kerja-kerja yang telah dilakukan di bawah subkontrak tersebut, plaintif mendakwa bahawa jumlah RM2,040,586.38 masih lagi tertunggak di bawah subkontrak tersebut. Plaintif telah memfailkan tindakan ini memohon untuk memasukkan penghakiman bagi jumlah RM2,040,568.38 tersebut. Defendan mempertikaikan tuntutan plaintif dan di dalam pembelaannya mendakwa kerja-kerja yang cacat oleh plaintif dan kelewatan dalam menyempurnakan kerja-kerja tersebut. Jumlah amaun yang dituntut oleh defendan terhadap plaintif melalui tuntutan balas adalah RM2,158,095.70. Plaintif bergantung kepada surat tidak bertarikh daripada defendan di mana defendan telah meminta pengesahan sama ada amaun RM1,310,806.02 perlu dibayar kepada plaintif sebagai keterangan bagi pengakuan fakta, yang mana memberi hak kepada plaintif untuk memasukkan penghakiman terhadap defendan di bawah A 27 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim Mahkamah Tinggi membenarkan plaintif memasukkan penghakiman, berdasarkan pengakuan fakta oleh defendan, untuk amaun RM1,310,806.02 dengan faedah. Ini merupakan

rayuan defendan terhadap keputusan tersebut. Defendan berhujah bahawa surat tersebut secara keseluruhan adalah bersifat pertanyaan memohon untuk pengesahan kedudukan akaun dan tidak seharusnya ditafsirkan sebagai pengakuan hutang. Defendan selanjutnya berhujah bahawa jawapan plaintif kepada surat tidak bertarikh tersebut yang menyatakan bahawa amaun yang perlu dibayar oleh defendan kepadanya adalah RM2,040,586.38 menunjukkan bahawa terdapat pertikaian yang sebenar.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Mohd Hishamudin HMR, menentang**) Surat tidak bertarikh defendan kepada plaintif bukanlah pengakuan fakta yang jelas di bawah A 27 k 3 KMT. Kandungan surat tersebut adalah bersifat pertanyaan berbanding bersifat pengakuan. Pertanyaan ini, bagi tujuan audit, telah dihantar kepada plaintif atas pelanggaran defendan sendiri dan bukan sebagai balasan kepada sebarang permintaan untuk apa-apa amaun yang dibuat oleh plaintif kepada defendan. Selanjutnya, plaintif tidak mengesahkan amaun yang dipersoalkan oleh defendan tetapi menyatakan amaun yang berlainan sebagai amaun yang perlu dibayar. Dalam mana-mana kes, meskipun pertanyaan defendan boleh dianggap sebagai pengakuan fakta yang jelas, mahkamah mempunyai budi bicara sama ada penghakiman perlu dimasukkan berdasarkan kepada keadaan-keadaan kes. Dalam kes ini, asas tuntutan plaintif adalah tidak jelas atau konsisten dan sebaliknya mengelirukan. Malahan, cara di mana plaintif mendapat amaun RM2,040,586.38 yang dituntut seharusnya menjadi isu untuk dibicarakan. Oleh itu, adalah tidak dijustifikasikan bahawa penghakiman dalam amaun RM1,310,806.02 seharusnya dimasukkan bagi pihak plaintif pada peringkat ini (lihat perenggan 23–28).

(2) (oleh **Azhar Ma'ah HMR**) Daripada fakta di dalam kes, surat tidak bertarikh, yang mana bermula daripada pejabat defendan sendiri, adalah bukti fakta bahawa rekod perakaunan defendan sendiri menunjukkan bahawa terdapat amaun sebanyak RM1,310,806.02 tertunggak yang perlu dibayar kepada plaintif. Walaupun plaintif mempertikaikan ketepatan amaun yang terhutang dan mendakwa bahawa amaun yang lebih banyak perlu dibayar dan tertunggak oleh defendan, terdapat pengakuan yang jelas oleh defendan bahawa terdapat baki yang perlu dibayar kepada plaintif berjumlah RM1,310,806.02. Defendan oleh itu berkewajipan untuk membayar kepada plaintif jumlah RM1,310,806.02 dan ia tidak membawa apa-apa perbezaan bahawa defendan sekadar bertanya dan meminta pengesahan tentang ketepatan angka tersebut (lihat perenggan 38).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 767–769.

Cases referred to

Affin Bank Bhd v Successcom Enterprise Sdn Bhd [2009] 1 MLJ 36, CA (refd)
Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors [1988] 3 MLJ 271, HC (distd)
Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 27 r 3

Appeal from: Civil Suit No S2–22–747 of 2008 (High Court, Kuala Lumpur)

C Soosay Nathan (Mohamad Fahzan bin Md Noor with him) (Christie Soosay Nathan & Associates) for the appellant.
Wong Suk May (Wong Gowry & Yip) for the respondent.

Mohd Hishamudin JCA (dissenting):

[1] This is an appeal by the appellant/defendant (Hasrat Usaha Sdn Bhd) against the decision of the learned judge of the High Court of Kuala Lumpur given on 28 October 2008. The learned judge had dismissed the appellant's appeal against the decision of the learned senior assistant registrar given on 7 December 2007. The learned senior assistant registrar had allowed the respondent's/plaintiff's (Pati Sdn Bhd) application before her pursuant to O 27 r 3 of the Rules of the High Court 1980. Dissatisfied with the decision of the learned senior assistant registrar, the appellant had appealed to the judge in chambers.

[2] The writ of summons and the statement of claim were filed on 28 July 2006.

[3] The statement of defence and counterclaim was filed on 30 November 2006.

[4] The reply to the statement of defence and defence to the counterclaim was filed on 12 January 2007.

[5] The O 27 r 3 application was filed on 27 November 2007.

[6] Order 27 r 3 states:

> Judgment on admission of facts (O 27, r 3)
>
> 3 Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without

A waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

B **[7]** I am allowing the appeal with costs. The following are my reasons.

[8] The respondent's claim against the appellant is for a sum of RM2,040,586.38. It is a claim for breach of contract. The respondent claims that it had under a subcontract performed certain construction works (works C pertaining to roadwork, roadside drains, sewerage and street lighting, etc) for the appellant who is the main contractor of a project in Putrajaya. The total costs of the works under the subcontract are RM11,285,551.51. Although the appellant had made payments to the respondent, nonetheless, a sum of RM2,040,586.38 is, allegedly, still outstanding.

D **[9]** The appellant in its defence alleges defective works on the part of the respondent and is claiming by way of a counterclaim against the respondent a sum of RM338,095.70 being the total sum incurred by the appellant to remedy the defects. There is also a further counterclaim alleging a delay of 520 E days on the part of the respondent in completing the works; and the appellant is claiming against the respondent a sum of RM1,820,000 as liquidated ascertained damages. The total sum the appellant is claiming against the respondent by way of counterclaim is RM2,158,095.70.

F **[10]** By an undated letter, the appellant had asked the respondent as to whether as at 31 December 2004 there was a sum of RM1,310,806.02 owing by the appellant to the respondent. It is not stated as to when this query was sent to the respondent. The query was 'For the purpose of the audit of our (the appellant's) Company's financial statement'. The letter of inquiry reads:

G

HASRAT USAHA SDN. BHD.

(Co. No. 89823–V)

No. 50–4–3A, Level 4, Wisma UOA Damansara

H No. 50 Jalan Dungun, Bukit Damansara, 50480 Kuala Lumpur

Tel: 03–27131088 Fax: 03–27152088

I PATI SDN BHD

17th Floor, Menara 2, Faber Towers

Jalan Desa Bahagia

Taman Desa

58100 Kuala Lumpur

Dear Sir,

CONFIRMATION REQUEST – PJR006 PROJECT

According to our records, the balance due to you is:

As at: 31.12.2004 Amount:RM1,310,806.02

Please sign in the space provided below if you agree with the above balance. If the above balance is not in agreement with your records, kindly detail below, the full particulars of the difference. In either case, please sign and return this letter directly to our auditors:

Skelchy Su Lim & Associates

9th Floor, MCB Plaza

No. 6, Changkat Raja Chulan

50200 Kuala Lumpur

Malaysia

Tel: (603)20323828

Fax: (603)20321868

This is not a request for payment and remittances should not be made to the auditors.

Yours faithfully,

HASRAT USAHA SDN BHD

(COMPANY NO: 89823–V)

[sgd — illegible]

.....

Please do not detach

Our records, the amount shown below is correct. In accordance with xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Bal as per cert 17: RM1,758,447.59

Retention: RM 282,138.79

RM2,040,586.38

Company stamp: SOON CHONG HOONG

SENIOR GENERAL MANAGER

CONTRACTS

Signature and designation: [Illegible signature]

Date:

[11] This undated letter was received by the respondent on 19 August 2005.

[12] The respondent responded to the inquiry. However, the response, just like the appellant's inquiry, is undated. And, also like in the case of the appellant's inquiry, it is not stated in the affidavits as to when the response was sent to the appellant. But it is probable that the response was communicated before 28 October 2005 (this is the date of the respondent's demand letter to the appellant — but I will come to this letter shortly). Be that as it may, in its undated response, the respondent stated that the sum owed by the appellant to it was RM2,040,586.38. This sum, according to the respondent, was made up of two items, namely:

(a) 'Bal as per cert 17' — RM1,758,447.59; and

(b) 'Retention' — RM282,138.79.

[13] In its affidavits, the respondent did not clarify what it meant by 'Bal as per cert 17'; nor is the alleged 'cert 17' exhibited. But I take 'Bal as per cert 17' to mean the balance sum owing to the respondent as stated in certificate No 17. Now, under the contractual arrangements, for the purpose of payments, certificates were issued by the defendant/appellant from time to time pursuant to para E(i) of the contract document which reads:

(E) Progress Payment and Retention

(i) Progress Payment shall be made to you at monthly intervals upon certification by Hasrat Usaha Sdn Bhd's authorized personnel of satisfactory completion of your works.

[14] There is reference to progressive payments and certifications in para 4.2 of the statement of claim. This paragraph states:

4.2 Bayaran progresif akan dibuat kepada Plaintif setiap bulan berdasarkan kepada perakuan (certification) oleh pihak Defendan atas penyempurnaan kerja Plaintif secara memuaskan.

[15] The above averment is not disputed.

[16] By 'Retention' I take it to mean the retention sum under subparas (ii), (iii) and (iv) of para E of the contract document. These subparagraphs read:

(ii) All payments shall be subjected to 10% retention and up to the maximum of 5% of the Sub-Contract Sum or Revised Sub-Contract Sum whichever is higher.

(iii) The first portion of retention sum (2 1/2%) shall be released upon issuing of Certification of Practical Completion by PJHSB.

(iv) The final portion of retention sum (2 1/2%) shall be released upon issuing of Final Certification by PJHSB.

[17] 'PJHSB' means Putrajaya Holdings Sdn Bhd. PJHSB is the employer of the project.

[18] The retention sum is referred to in the statement of claim as follows:

4.3 Kesemua bayaran adalah tertakluk kepada tahanan ('retention') sebanyak 5% dan sehingga tahap maksima sebanyak 5% daripada jumlah kontrak atau jumlah kontrak yang telah disemak (revised).

4.4 Bahagian pertama jumlah tahanan (2 1/2%) akan dilepaskan sejurus selepas Pengeluaran Sijil Penyiapan Kerja ('Certification of Practical Completion') oleh Putrajaya Holdings Sdn Bhd ('PJHSB'), iaitu Majikan di bawah projek tersebut.

4.5 Bahagian akhir wang tahanan (2 1/2%) akan dilepaskan sejurus selepas Pengeluaran Sijil Terakhir (Final Certification) oleh PJHSB.

[19] These averments of the plaintiff are also not disputed.

[20] Then in para 5 of the statement of claim it is alleged as follows:

5 Plaintif telah memulakan kerja-kerja pembinaan di bawah Surat Penerimaan Tawaran tersebut pada atau sekitar 18.10.2000 dan menyempurnakan kerja-kerja tersebut pada 1.8.2002 di mana terdapatnya suatu baki jumlah tertunggak sebanyak RM2,040,586.38 di mana butir-butirnya adalah dalam pengetahuan defendan dan yang mana butir-butir ringkasnya adalah seperti berikut:-

Butir-butir	
Jumlah nilai kerja yang disempurnakan	RM 8,357,958.79
Campur: Nilai kerja-kerja perubahan (variation works)	RM 2,927,592.72
	RM11,285,551.51
Tolak: Jumlah yang telah dibayar (berdasarkan kepada Sijil 1 sehingga 15)	RM 9,250,714.38
	RM 2,034,837.13
Baki b/h	RM 2,034,837.13
Campur: Senarai tolakan	RM 5,749.25
	RM 2,040,586.38

[21] This allegation is repeated in para 5 of the respondent's/plaintiff's supporting affidavit. This allegation in para 5 of the statement of claim (and in para 5 of the affidavit in support) is denied by the appellant/defendant.

[22] By a letter of 28 October 2005 the respondent's solicitors' (Messrs SM Wong & Gowry) demanded from the appellant a sum of RM2,040,586.38 as allegedly a sum still owing by the appellant under the project. This letter, unfortunately, is not exhibited. But that such a demand was made appears not to be disputed.

[23] For an applicant to succeed in an application under O 27 r 3 he must satisfy the court that the alleged admission is unequivocal (see *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] 2 CLJ 489). In my judgment, the appellant's undated letter to the respondent does not amount to an unequivocal admission of fact under O 27 r 3. Firstly, the content of the letter is in the nature of an inquiry rather than in the nature of an admission.

[24] Secondly, the appellant's inquiry is not for the purpose of satisfying any demand from the respondent for the repayment of a debt or for satisfying any legal liability towards the respondent. Instead, it was for 'audit' purposes of the appellant.

[25] Thirdly, it is to be appreciated that when the appellant made the inquiry, it was not in response to any demand for any sum made by the respondent to the appellant. The inquiry was sent to the respondent on the appellant's own volition.

[26] Fourthly, the respondent did not confirm the sum inquired by the appellant. Instead the respondent mentioned a different sum as the amount owing, a sum much bigger than the appellant's figure.

[27] Even if the appellant's inquiry can in law be regarded as an unequivocal admission of fact, still the court has a discretion as to whether judgment should be entered, depending on the circumstances of the case (see *Affin Bank Bhd v Successcom Enterprise Sdn Bhd* [2009] 1 MLJ 36). In the circumstances of the present case, I am not minded to exercise my discretion in the respondent's favour. My reason is that the sum 'RM2,040,586.38' as claimed in para 5 of the statement of claim (and also in para 5 of the respondent's affidavit in support) seems to be different from the sum 'RM2,040,586.38' as claimed in the respondent's undated response to the appellant's undated inquiry. My grounds for so saying are two-fold. Firstly, while para 5 of the respondent's statement of claim (and para 5 of the respondent's affidavit in support) refers to 'Sijil 1 hingga 15' and 'Senarai tolakan', the respondent's response to the appellant's inquiry, on the other hand, refers to 'Bal as per cert 17' and 'Retention'. We are

left in the dark what certificate No 17 is all about; or, for that matter, what certificates 1–15 and 'Senarai tolakan' are all about. Why does para 5 of the statement of claim make no mention at all of certificate No 17? The respondent fails to explain this omission. Secondly, while para 5 of the statement of claim (as well as para 5 of the affidavit in support) does not assert that the sum of RM2,040,586.38 that the respondent claims from the appellant includes any retention sum, the respondent's response to the appellant's inquiry, on the other hand, states that the sum of RM2,040,586.38 mentioned in the response includes a retention sum of RM282,138,79.

[28] What all the above means is that the basis of the respondent's claim itself is not clear or not consistent. Indeed, the respondent's claim is confusing. In my judgment, how the respondent arrived at the sum of RM2,040,586.38 ought to be an issue to be tried; and for this reason I do not think that it is justified that at this juncture judgment ought to be entered for the sum of RM1,310,806.02 in favour of the respondent.

Azhar Ma'ah JCA:

[29] This appeal is brought by the defendant against the decision of the High Court judge, Kuala Lumpur, who, on 28 October 2008 dismissed its appeal to set aside the decision of the senior assistant registrar allowing the plaintiff's application under O 27 r 3 of the Rules of the High Court 1980 ('RHC 1980') to enter a judgment on an admission of fact by the defendant for the amount of RM1,310,806.02 and interest at 8%pa from the date of the summons until full settlement.

[30] The facts of the case as stated in the trial judge's grounds of judgment are these:

> The defendant appointed the plaintiff as its subcontractor (see letter of offer dated 18 October 2000 in encl 4 exh 'RS-1'). The subcontract sum was RM11,720,207.25. The plaintiff says that all works under the subcontract had been completed on 1 August 2002. The plaintiff filed the present action seeking to enter judgment for RM2,040,586.38 which the plaintiff claims is the balance of the subcontract monies owed to them by the defendant.
>
> The defendant disputes the plaintiff's claim and says that the subcontract works were to have been completed by 27 February 2001. Therefore, there was a delay of 520 days and the defendant counterclaims against the plaintiff for the sum of RM1,820,000. The defendant further claims the sum of RM338,095.70 being costs of rectification works which the defendant says the plaintiff has failed to carry out. Therefore, the defendant claims against the plaintiff a total sum of RM2,158,095.

THE PLAINTIFF'S CASE

The plaintiff avers that by an undated letter the defendant requested a confirmation from the plaintiff on the balance due to the plaintiff as at 31 Devember 2004. In the defendant's letter, the plaintiff was requested to advise the defendant's auditors 'of the correctness of the balances as stated below' which according to the defendant's record, the balance due to the plaintiff as at 31 December 2004 is RM1,310,806.02 (see encl 4 exh RS-2B). The plaintiff replied that according to its records the correct amount is RM2,040,586.38.

[31] Order 27 r 3 of the Rules of the High Court 1980, reads as follows:

Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

[32] It is in the light of the above provision that the plaintiff applied for judgment by admission, founded on a letter from the defendant seeking confirmation that a sum of RM1,310,806.02 was due to the plaintiff. For clarity we reproduce the letter in question which reads.

HASRAT USAHA SDN. BHD.

(Co. No. 89823–V)

No. 50-4-3A, Level 4, Wisma UOA Damansara,

No. 50, Jaian Dungun, Bukit Damansara, 50490 Kuala Lumpur

Tel: 03-2715 1088 Fax: 03-2715 2088

PATI SDN. BHD.

17th Floor, Menara 2, Faber Towers

Jalan Desa Bahagia Taman Desa

58100 Kuala Lumpur

Dear Sir,

CONFIRMATION REQUEST — PJR006 PROJECT

For the purpose of the audit of our Company's financial statement, please advise our auditors of the correctness of the balances as stated below.

According to our records, the balance due to you is:

As at: 31.12.2004 Amount: RM1,310,806.02

Please sign on the space provided below if you agree with the above balance. If the above balance is not in agreement with your records, kindly detail below, the full particulars of the difference, in either case, please sign and return this letter directly to our auditors.

Skelchy Su Lim & Associates

9th Floor, MCB Place

No. 6, Changkat Raja Chulan

50200 Kuala Lumpur

Malaysia

Tel: (603)2032 3828

Fax:(603)2032 1868

This is not a request for payment and remittances should not be made to the auditors.

Yours faithfully,

HASRAT USAHA SDN. BHO.

(COMPANY NO: 89823–V)

Sgd.

.....

Please do not detach.

In accordance with our/my record, the balance shown above is correct except as noted below.

Company stamp:.....

Signature and designation:.....

Date:.....

[33] Counsel for the defendant submitted that the wording of the said letter taken as a whole is not an admission of debt but merely an enquiry and request for confirmation of the state of account. It is argued further that by reason of the plaintiff disputing that amount and stating that the actual amount due and owing to the plaintiff from the defendant was RM2,040,586.38, there was a real dispute and it cannot be said that the content of the defendant's letter was an unequivocal admission of a debt.

[34] Though not crucial and relevant to this appeal before us, I would, for the sake of completeness, mention that the defendant in its submission also submitted that it had a defence of set-off and counterclaim for liquidated and ascertained damages. It is avered that by reason of the plaintiff failing to complete the work on time, the defendant had to employ someone else to carry out certain rectification works. This had cost the defendant RM1,820,000 which it is now claiming from the plaintiff by way of set off and counterclaim.

[35] Order 27 r 3 provides summary procedure whereby the court in exercising its discretion may allow a judgment to be entered in the circumstances where there is an unequivocal admission of fact which entitles the plaintiff to enter judgment against the defendant.

[36] In our instant case, the main thrust of the argument for the defendant was that the letter in question taken as a whole is actually in the nature of enquiry and not an admission of debt. In fortification of this argument counsel for the defendant produced a passage from the judgment of Godfrey J in *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors* [1988] 3 MLJ 271. The facts of that case are these:

> The plaintiff entered into a contract with the defendants for the sale of cattle. A dispute arose between the parties and the plaintiff filed the present application for judgment on admissions. The plaintiff contended that as it had already obtained judgment against the first defendants, the court should treat the third defendant as having admitted the plaintiff's claim as the third was in partnership with the first defendants. However, this allegation of partnership was not accepted by the third defendant. The second contention of the plaintiff is that since the third defendant had collected the cattle without tendering the shipping documents to the shipping agents and there was an admission in the form of an indemnity given by the third defendant to the shipping agents, the plaintiff's application for judgment should be allowed.

[37] It was decided, inter alia, that the admission must be a clear admission of all and not simply evidence of some of the facts upon which the plaintiff relies to establish his case of action. In the circumstances of this case, it was held there was no such admission.

[38] With respect it must be noted that the facts of the above case are distinguishable. As can be seen from the facts of the instant case the letter exh RS-3 emanated from the defendant's own office and presumably the contents of that letter must have come from the defendant's own accounts department. Although the plaintiff disputed the correctness of the amount stated in the said letter, claiming that a bigger amount was due and owing from the defendant we are of the view that, there is a clear and unequivocal admission by the defendant that there was a balance due to the plaintiff to the tune of RM1,310,806.02. Up to that amount, the defendant is under obligation to pay to the plaintiff. It does not make any difference that the defendant was merely enquiring and seeking confirmation of the correctness of the figure. The facts still remained that the defendant's own accounting records show that there was an outstanding sum of RM1,310,806.02 payable to the plaintiff. Accordingly the appeal of the defendant is dismissed with costs.

[39] My learned brother A Samah Nordin JCA had seen this judgment and expressed his agreement with it.

Appeal dismissed with costs.

Reported by Kohila Nesan